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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHAWN ALBERT BRUSACORAM,<br><br>Defendant and Appellant. | C068728<br><br>(Super. Ct. No. 10F00208) |

A jury found defendant Shawn Albert Brusacoram guilty of two counts of lewd and lascivious acts with a child under the age of 14 years. The trial court found he had a prior conviction of the same offense, within the meaning of the one strike law and the habitual sexual offender law. Defendant was sentenced to state prison for two consecutive terms of 25 years to life. (See *People v. Murphy* (2001) 25 Cal.4th 136, 149-154.)

On appeal, defendant contends: (1) admission of his prior sexual offense pursuant to Evidence Code[1] sections 1101, subdivision (b), and 1108 was an abuse of discretion; and (2) the prosecutor committed several instances of prejudicial misconduct. We affirm.

FACTS

K. Doe was seven years old when she testified in April 2011. From the time she was 18 months old, she lived with her paternal grandmother and stepgrandfather in Clovis. Her mother, Kari C., lived in Sacramento, and K. visited her there once or twice a month.

Kari had been a childhood friend and foster sister of Rene S. As adults, the duo renewed their friendship. By that time, Rene S. was married to defendant and the couple had two children, C. and G.

When K. visited her mother, they would go to Rene's residence and K. formed a friendship with C. K. sometimes was alone with defendant, whom she called "Uncle Shawn."

More than 10 times, defendant had K. sit on his lap and used his hand to touch her where she went "pee pee." He would put his hand inside her clothes and touch her on her skin. One touching occurred while eight-year-old C. was present on the couch, either sleeping or pretending to be asleep. The last touching occurred when K. was six or seven years old. K. told

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[1] Further statutory references are to the Evidence Code unless otherwise indicated.

him to stop doing it, and he stopped. But he told her, "Don't tell anybody or I'll go to jail."

In 2009, K. started exhibiting unusual behaviors. She had trouble controlling urine during the day and at night. She went from being a happy, average kid to being angry all the time. She started being verbally abusive to her many animals. She did not want to sleep alone, and she had nightmares that caused her to cry and scream in her sleep. On one occasion after she had bathed, her stepgrandfather saw her naked on the floor with the family dog between her legs licking K.'s vagina. K. explained that "the dog wanted to do it." In October 2009, K. told her stepgrandfather that she had a secret she could not tell anyone, not even her mother. When he asked her why not, she said it was "Because my cousin C.'s father will lose his job and go to jail." K. started crying and told her stepgrandfather not to tell her grandmother. K. was hysterical and ran out into the darkness. Her grandmother chased her and brought her back to the house. K. said she could not reveal her secret because "Uncle Shawn would get in trouble" and "he knew where she lived."

The next day K.'s stepgrandfather, a retired Fresno police officer, obtained a referral to a local officer who could speak with K. On November 4, 2009, K. and her grandparents met with Clovis Police Detective John Willow at a restaurant. After they conversed together for a few minutes, Detective Willow asked to speak privately with K. When they were alone, K. told him she had a "bad secret" and, if she told anyone, "her Uncle Shawn

would go to jail and be arrested." She said the secret would occur while they were sitting on the living room couch or chair. She explained that, most of the time, they were alone except when C. was in the room sleeping or pretending to be asleep. Following this disclosure, K. declined to reveal further details and Detective Willow did not press her for more information. However, K. agreed to discuss her secret with "a friend of" the detective at a Multi-Disciplinary Interview Center (MDIC).

Approximately 90 minutes into the MDIC interview, K. began discussing details of her secret. K. was very reluctant, although she quickly disclosed there was a secret and she was not supposed to tell the secret. On an anatomical drawing, K. marked the location where defendant had touched her. The jury watched a videotape of the interview.

Immediately after the MDIC interview, K. told her grandparents that "Shawn put his hands in my pants and tickled my po-po, and that's all I'm going to say." Detective Willow advised the grandparents to keep K. under their control and not allow her to travel to Sacramento. The grandparents applied for guardianship of K.

Following the interview, Detective Willow asked K.'s grandmother who "Shawn" was. The grandmother knew Shawn was Rene's husband, but she did not know the couple's last name. The grandmother telephoned Rene, obtained their name and address, and then forwarded the information to Detective Willow who determined defendant was a sex registrant. The grandparents never told K. about defendant's prior conviction for lewd and

lascivious conduct. Before the investigation was transferred to Sacramento, K. confirmed defendant's identity by selecting his photograph from an array.

Rene admitted that defendant had been left alone with her two children and K. on occasions when K. had visited between 2006 and 2009. Rene knew her husband was a registered sex offender.

Defendant's adult half sister, S. J., testified that defendant had molested her when she was a child. She was six years old when the molestations started and nine years old when they ended. The molestation included defendant putting his hands down S. J.'s pants and on her vagina.

Following S. J.'s testimony, the parties stipulated that defendant, who was born in 1975, had been convicted in January 1994 of lewd and lascivious acts with S. J. and with defendant's brother, D. J., starting when S .J. was six years old and D. J. was seven years old. The conduct stopped when law enforcement agencies were notified.

Defendant presented expert testimony from William O'Donohue on the subject of interview suggestibility. He had never found that an interview had been done perfectly.

C. testified for the defense that she had never seen defendant do anything bad to K., and K. never told her any "bad secrets." K. came over about once a month. There were times when defendant would watch C., C.'s little brother, and K., by himself.

## DISCUSSION

### I

### *Admission Of Prior Sexual Offense*

Defendant contends admission of his prior sexual offense pursuant to sections 1101, subdivision (b), and 1108 was an abuse of discretion and violated his due process and fair trial rights. We disagree.

In pretrial motions, the prosecution made an offer of proof that defendant had molested his six-year-old sister and seven-year-old brother. The prosecution argued the evidence was relevant as propensity evidence and to prove intent, absence of mistake, and modus operandi.

The defense filed its own pretrial motion arguing the prior conduct was too remote, too dissimilar, and too inflammatory.

The trial court found the 1994 prior offenses were not too remote for admission under section 1108. The court ruled S. J. could testify defendant had put his hands down her pants, and D. J. could testify defendant had told him not to tell his mom or dad because, if he did, defendant would go to jail.

At trial, S. J. testified that defendant "molested [her]. It wasn't just he put his hands on [her] vagina and that's all." Nevertheless, she did not describe any additional conduct. Defendant's motion for a mistrial based on the reference to additional conduct was denied.

Defendant claims section 1101, subdivision (b), did not make the prior conviction admissible to show common plan or modus operandi. It is not necessary to consider this issue

because section 1108, subdivision (a), creates an exception to the bar of section 1101. We thus turn to defendant's contention section 1108 did not apply because, under section 352, the prior conviction was too remote, would consume too much time, risked confusing the jury, and was overly inflammatory.

"[B]ecause . . . section 1108 conditions the introduction of uncharged sexual misconduct or offense evidence on whether it is admissible under . . . section 352, any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. 'A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial. [Citations.]' [Citation.] As our Supreme Court stated in [*People v.* ]*Falsetta* [(1999) 21 Cal.4th 903], in balancing such . . . section 1108 evidence under . . . section 352, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]' [Citation.] In

evaluating such evidence, the court must determine 'whether "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses."' [Citation.]

"On appeal, we review the admission of other acts or crimes evidence under . . . section 1108 for an abuse of the trial court's discretion. [Citation.] . . . '"The 'prejudice' referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.] We will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling '"falls outside the bounds of reason." [Citation.]' [Citation.] In other words, we will only disturb a trial court's ruling under . . . section 352 where the court has exercised its discretion in a manner that resulted in a miscarriage of justice. [Citation.]" (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104-1105, fn. omitted; see *People v. Doolin* (2009) 45 Cal.4th 390, 439.)

"No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) Because "uncharged prior offenses that are very similar in nature to the charged crime logically will have more probative value in proving propensity to commit the charged offense," it has been recognized that "'significant similarities

between the prior and the charged offenses may "balance[] out the remoteness." [Citation.]' [Citation.]" (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966, 968, quoting *Branch*, at p. 285.) Here, the offenses were sufficiently similar to offset the remoteness.

Further, "the passage of time generally goes to the weight of the evidence, not its admissibility." (*People v. Hernandez*, *supra*, 200 Cal.App.4th at p. 968.) Thus, evidence of prior sexual misconduct has been ruled not too remote in cases of a gap of 18 to 25 years (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1393, 1395 [1970-1977 and 1995]); 23 years (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900); 20 to 30 years (*People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 991-992); and 30 years (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 285). In *Hernandez*, the gap was between seven and 40 years, depending on which past and present acts were considered. (*Id.* at p. 968.)

In 1994, defendant was committed to prison for six years and the record does not indicate when he was released. The information alleged the present offenses occurred between August 2006 and September 2009. There is little probability defendant was incarcerated less than two years and, thus, little likelihood the relevant gap is greater than 13 years. Under the foregoing authorities, the evidence was not too remote.

The section 1108 evidence did not involve undue consumption of time. S. J.'s trial testimony consumed five pages of transcript. The stipulation as to D. J.'s testimony consumed less than a page. The disputed pretrial proceedings consumed

seven pages; the other crimes instruction, CALCRIM No. 1191, consumed less than two full pages; and the disputed summations consumed 11 pages.[2] Defendant complains about posttrial motions, but those possible future motions could not have been a factor in the trial court's section 352 analysis. Defendant has not shown that the prior crimes evidence involved an undue consumption of time.

Defendant claims the probability of confusion of the jury weighed in favor of exclusion. He claims "[n]ot even curative admonitions or limiting instructions can eliminate the risk of prejudice." We disagree.

Section 1108 represents a legislative determination that, where the requisite admonitions and instructions are given, the trial court is entitled to find that any residual prejudice is outweighed by probative value. The trial court properly so found in this case. No undue risk of jury confusion as to the proper use of the prior sexual offense evidence appears.

Defendant's reliance on *People v. Bracamonte* (1981) 119 Cal.App.3d 644, disapproved on other grounds in *People v. Calderon* (1994) 9 Cal.4th 69, 79-80, is misplaced. *Bracamonte* involved the bifurcation of prior conviction allegations where

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[2] Defendant suggests the length of the paperwork submitted on in limine motions is relevant to the issue of undue time consumption. This suggestion produces an absurd result. An opponent of evidence could increase the likelihood of its exclusion simply by increasing the heft of the written submission. Defendant cites no authority for this mischievous rule, and we are not aware of any.

no statute such as section 1108 made them relevant to the current charges. (*Bracamonte*, at p. 650.)

The evidence put before the jury was not unduly inflammatory. Defendant also relies on S. J.'s trial testimony that he "molested [her]. It wasn't just he put his hands on [her] vagina and that's all." Defendant's reliance on this trial testimony is misplaced. The in limine proceedings did not anticipate that S. J. would testify in that manner, and the fact she did so does not suggest the trial court's weighing process in limine was erroneous. Defendant addressed the issue of S. J.'s testimony in a motion for mistrial. No error in the in limine ruling is shown.

Defendant lastly contends that, without the effective safeguard of section 352, he was subjected to highly prejudicial evidence that rendered his trial fundamentally unfair for purposes of federal due process. Because we have rejected defendant's section 352 claim, we also reject his due process claim.

II

*Prosecutorial Misconduct*

Defendant contends the prosecutor committed several instances of prejudicial misconduct in violation of his due process rights. Defendant argues his claims are cognizable notwithstanding his trial counsel's failures to object and request a curative admonition.

"A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground,

the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

A

*Defense Expert Witness Fees*

The prosecutor established on cross-examination that the defense expert, Dr. O'Donohue, had testified approximately 90 times previously for the defense, had earned $300 per hour for work on defense cases, and had never found that a child sexual assault interview had been done without some error.

In summation, the prosecutor argued that Dr. O'Donohue is "an expert on how to make half a million dollars on the backs of children." After reiterating that "[t]hat's how he makes his money, on the backs of children," the prosecutor noted that Dr. O'Donohue had earned at least $5,000 for his testimony in this case.

Defendant forfeited his claim of misconduct because a timely objection and admonition would have cured any possible prejudice. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.)

In any event, there was no misconduct. "[H]arsh and colorful attacks on the credibility of opposing *witnesses* are permissible. [Citations.] Thus, counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 162.)

That is what the prosecutor did here. His colorful language about "the backs of children" was a permissible comment on Dr. O'Donohue having testified for the defense, in exchange for a fee, in over 90 prior cases. Defendant's claims that the statement was "wildly intemperate" and tended to "'divert[] the jury's attention from its proper role'" have no merit.

Defense counsel was not required to make a futile objection merely to create a record impregnable to assault for claimed inadequacy of counsel. (*People v. Stratton* (1988) 205 Cal.App.3d 87, 97.) There was no ineffective assistance.

B

*Vouching For K.'s Testimony*

Defendant claims the prosecutor "vouched for" the credibility of K. when, in closing summation, he referred to the contents of a training conference he had attended. We disagree.

"[A] 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of

their testimony by referring to evidence outside the record.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 432-433.)

Here, however, the prosecutor did not refer to *evidence* of defendant's guilt that, for some reason, had not been presented to the jury. Nor did the prosecutor vouch for K.'s credibility. Instead, he told a story from his training class that could assist the jurors in making their own evaluation of K.'s credibility.[3] The story illustrated that many child sexual

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[3] The prosecutor described the conference as follows: "The first day of the conference was the same old training stuff, you know, you're sitting there and someone is telling you what to do. Now, right before lunchtime the instructor said, 'Make sure that all of you come back on time because when you come back, I'm going to call each one of you out, at random, and I'm going to ask you about your last sexual experience: Did you enjoy yourself? Was it with your spouse or were you cheating on them? Did you have oral sex? Did you have anal sex? What kind of positions did you do? Did you talk during sex? Did you really like it? We're just going to really get into your last sexual experience. So have a good lunch. See everybody at 1 o'clock.'

"Now, this was all DAs, so we all went to lunch and we all were complaining about 'How dare he? Who does he think he is? I don't want to talk about my last sexual experience. That's none of his business. Whoever I did it with, whatever happened, I'm not talking about it.' And a lot of people said, 'I'm not going back because I'm not going to subject myself to being asked about the last person I was with and what we did.'

"But I went because I was curious. I wanted to see what this was all about. So I went, and it was half empty. It was full when it started in the morning; and by the time we got back from lunch, it was half empty.

"And the man stood up, and immediately my heart started beating, like how you feel when you're a kid in grade school and you know the teacher is going to ask you a question and you don't know the answer. And I was putting my head down and I was hoping he didn't ask me because I didn't want to talk about it.

assault victims are reluctant to tell juror's of their experience. As a result, the prosecutor urged the jury to hold K.'s testimony to the standard of a six-year-old child rather than to the standard of an adult. He did not urge the jury to find her credible based on information only he possessed.

A timely admonition could have cured any possible harm from the prosecutor's story. Specifically, the jury could have been admonished that the training class had discussed child victims in general, not the evidence in this case; and the prosecutor's decision to use material from the class in his summation did not reflect an out-of-court determination that *this* victim's testimony was true.

Defense counsel's failure to object and seek an admonition forfeits his contention on appeal. However, these omissions could not have been prejudicial because the prosecutor did not

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"And he got up and he said, 'Now you know what it's like to be the victim of a sexual assault.'

"And that's when it hit me, that we ask these children to come before a bunch of strangers and talk about some of the most intimate things that we don't talk about with our most cherished loved ones, but we expect a six-year-old to have everything down. She has to testify 12 feet from the man [who] did this to her. We expect that. We expect her to testify in front of 12 people, 24 pairs of eyes gazing on her.

"So I'm sorry her testimony is not completely perfect. I'm sorry that she's a six-year-old girl. But her testimony and evidence in this case is good enough to find this defendant guilty. So if you want to hold her to the standard of an adult, go ahead. But she's a six-year-old girl, and she came in here, looked this man in the eye, and said that he was the one who did it."

vouch for K.'s credibility or refer to evidence relevant to this case that was outside the record. There was no prosecutorial misconduct and no ineffective assistance.

C

*Eliciting Evidence Excluded In Limine*

Defendant claims the prosecutor committed misconduct when he elicited testimony that violated the trial court's in limine order. He relies in part on S. J.'s testimony that defendant "molested [her]. It wasn't just he put his hands on [her] vagina and that's all."

Although defense counsel sought a mistrial based on S. J.'s testimony, he elected for tactical reasons to refuse any curative admonition or instruction that would call attention to the testimony. Thus, defendant failed to preserve any claim of prosecutorial misconduct. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.) Because counsel expressed a tactical purpose for refusing any admonition, any claim of ineffective assistance must be brought in habeas corpus proceedings. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

In any event, there was no misconduct. The prosecutor explained that he had twice cautioned S. J. about the permissible scope of her testimony. The prosecutor added that he had asked S. J. "specifically leading questions" to keep her testimony within permissible bounds; he did not know what else he could have done. *People v. Piper* (1980) 103 Cal.App.3d 102, 112, on which defendant relies, is distinguishable because it

involved *conduct*, albeit inadvertent, *by the prosecutor* as opposed to by a witness.

The other evidence allegedly elicited in violation of the in limine order is the grandmother's testimony that K. had said she could not reveal her secret because "Uncle Shawn would get in trouble" and "he knew where she lived." The in limine order had excluded the grandmother's testimony "regarding any threats that [defendant] made to K[.]" Specifically, the order had excluded evidence that defendant had "*told [K.]* he knew where she lived." (Italics added.)

Defendant's argument is based upon a misquotation of the grandmother's testimony in his opening brief. According to the brief, "[the grandmother] testified that K[.] said *she* would be in trouble if she revealed her secret." (Italics added.) The misquotation arguably suggests *defendant* would cause "trouble" for K., and K. *knew of* the impending trouble *because defendant had threatened her*.

The phrase actually spoken carries no such connotation. The assertion that *Uncle Shawn* would get in trouble does *not* suggest defendant had made any threat.

Because K.'s phrase referred to *defendant* getting in trouble, her subsequent comment that he "knew where she lived" appears to reflect *her fear of him retaliating* for her *getting him* in trouble. There is no suggestion K.'s fear of retaliation was based on defendant having *threatened* her, as opposed to his having *molested* her. This is because the grandmother never uttered the excluded phrase that *defendant had told* K. he knew

where she lived. K.'s family and defendant's family had socialized for years, and K.'s recognition that he knew where she lived was entirely unremarkable. The grandmother's testimony did not violate the in limine order, and the prosecutor's elicitation of the testimony was not misconduct.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

BLEASE, J.